IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 230

H. K. PORTER COMPANY, INC.
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondents

REPLY BRIEF FOR PETITIONER

The Company is reluctant to burden this Court with a factual issue which has no direct bearing on the pure, legal question presented by the Company's petition, namely, whether the Board has the power to order a party to agree to a substantive provision of a collective bargaining agreement. However, the Company must call the Court's attention to an important misstatement of fact contained in the Union's Brief in Opposition to the Company's petition. At pages 1 and 4 of the Union's Brief it is contended that after the District of Columbia Court of Appeals' original opinion enforcing the Board's bargaining order (363 F. 2d 272), the Company "continued to refuse the union's [check-off] request, *offering no reason for its continued resistance*", and that the "Company *offered no reason for its refusal, simply stating that it did not construe the Board's order as re-*

quiring that it agree to the request." Again, on page 6 of the Union's Brief, this question is asked of the Court: "Of what value is Section 8(a)(5) if, after bad faith has been found, the employer may respond by *silent, unexplained refusal to proceed further?*" (Emphasis added).

The effect of these misstatements is to depict the Company as openly defying an order of the Board as enforced by the Court of Appeals by continuing to maintain without explanation a position previously found by the Court of Appeals to be unlawful. This is simply not true.

There is little question that under the language of the Court of Appeals' original opinion the Company, after further bargaining, would have been required to make some kind of concession with respect to the Union's demand for check-off in order to avoid contempt proceedings; but it is equally clear that the Court of Appeals did not require that such a concession *be made outright, without further bargaining.* Thus, the Court of Appeals stated at 363 F.2d 276:

> ". . . it is not necessary to include a specific reference to the check-off in the Board's order. . . . In any contempt proceeding, the record made before the Board in both Section 10(b) proceedings will be available to this court. Thus we will be in a position to make a judgment based not only on the Board's order, *but on the entire record of this company's performance at the bargaining table.*" (Emphasis added).

Notwithstanding this clear wording by the Court of Appeals, the Union insisted that the Court of Ap-

peals' decision required the Company to make an outright gift of a dues check-off provision without any bargaining at all (App. pp. 17-18).

By taking this position, the Union itself precluded further bargaining, for the Union had rejected in advance any attempt by the Company to negotiate over alternative methods of dues collection or, if check-off were ultimately agreed upon, to ask for something in return. That the Company's interpretation of the Court of Appeals' opinion was correct and was held in good faith was recognized by the Board when it declined the Union's request for a contempt proceeding and closed the case on the ground that the Company was in compliance with the Board's order as enforced by the Court of Appeals.

Despite this uncontradicted factual background, the Union in its brief attempts to depict the Company as continuing to ignore its duty to bargain even after the clear directive from the Court of Appeals and thus seeks to discredit the Company in the eyes of this Court and to provide a basis for its argument that the present order is necessary to effectuate the policies of the Act. The inference is made that the *order to bargain* over check-off became *inadequate* when the Company refused to *grant outright* a provision for dues check-off, and that therefore the policy of the Act as clearly expressed in Section 8(d) should not prevent the Board from fashioning an *adequate* remedy.

The record in this case supplies no support whatsoever for the inference on which this argument is based. Because of the Union's insistence that the order required the Company to agree outright to a dues check-

off provision, the order was never really tested at the bargaining table.

The Court of Appeals below recognized that "the National Labor Relations Act is grounded on the premise of freedom of contract" by which the "substantive terms of the collective agreement are to be forged by the parties to it, not by the Board", and that "remedies which impinge on it are not to be casually undertaken", (389 F. 2d 295, 300). The Union and the Board contend that the "unique" circumstances of this case justify the imposition of such a remedy.

The Company submits that Congress in its wisdom has withheld from the Board the power to compel agreement *under any circumstances whatsoever,* and that the circumstances of this case serve only to demonstrate the wisdom of that policy.

Petitioner respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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